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No. 92-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE E. NEARBURG,
Petitioner,

v.

BAMERILEASE CAPITAL CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
WILLIAM J. KEMPENICH
BA LEASING & CAPITAL CORPORATION/BANK OF AMERICA NT&SA
4 Embarcadero Center
12th Floor
San Francisco, CA 94111

MARILYN SHEA-STONUM
(Counsel of Record)
WILLIAM D. MANSON
JOHN A. WASLEFF
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Was the petitioner denied his right to due process when the district court after an evidentiary hearing following full discovery found that petitioner had agreed to a settlement and then enforced the settlement?

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STATEMENT

Bamerilease Capital Corporation, now known as BA Leasing & Capital Corporation ("BA"),[1] filed a lawsuit in November of 1985, in the Northern District of Texas against Eugene E. Nearburg ("Nearburg") and several corporations with which he was affiliated, including GEX Hardy, Inc., GEX Kentucky, Inc., General Exploration Corporation, and Holmes Land Company (collectively,

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that BA Leasing & Capital Corporation is a wholly owned subsidiary of Bank of America National Trust and Savings Association which, in turn, is a subsidiary of Bank America Corporation, a publicly traded Delaware corporation. BA Leasing & Capital Corporation has no publicly traded subsidiaries.

the "GEX Companies"). Pet. App. 1a.[2] The suit alleged various types of tortious conduct directed by Nearburg for his personal benefit and breaches of contract by the defendants. Pet. App. 1a. Five months later, the GEX Companies filed bankruptcy petitions in the Northern District of Ohio, causing the litigation to be stayed. Pet. App. 1a-2a. Subsequently, the case was transferred from the Northern District of Texas to the Northern District of Ohio, where the bankruptcies were pending. The issues with the various corporate defendants were resolved in the bankruptcy court, leaving the case unresolved with respect to Nearburg only. Pet. App. 2a. Because no party ever requested a jury trial, a bench trial was set to begin on November 8, 1989. Pet. App. 2a.[3]

Several days before trial, Nearburg and BA negotiated a settlement agreement. The terms of the settlement were specified in two letters. The first letter, written by BA's counsel, set forth in detail the material terms of the settlement. Nearburg's attorney then wrote a second letter incorporating the terms of the first letter by reference, and adding certain clarifications that were, in turn, accepted by BA. Pet. App. 2a. The second clarifying letter was signed not only by Nearburg's counsel, but also by Nearburg himself. Pet. App. 2a, 6a. A third letter also evidenced the agreement. This third letter, which was also written by Nearburg's counsel, stated: "I enclose a copy of a Fax letter which Mr. Nearburg and I have signed to evidence the agreement. I think you can represent to the Court that the matter is finally concluded." Pet. App. 2a. These three letters were delivered to the district court on the day before trial, Pet. App. 2a, and

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[2] All citations to "Pet. App." refer to the Appendix to the Petition filed by Nearburg.

[3] Nearburg suggests in his petition that the underlying litigation was going to be tried to a jury. Petition for Writ of Certiorari, hereinafter "Pet. Brief," at 2. This suggestion is wrong; all parties had waived their right to a jury in the case.

upon receipt of the letters, the district court vacated the trial date. Pet. App. 6a.

After the trial date was lost, Nearburg reneged on the settlement. BA then filed a motion to enforce the settlement agreement. Pet. App. 3a. A timely response was made by Nearburg's then counsel of record. Weeks later, without approval from the court and without complying with local rules, Nearburg's new counsel filed an additional response to BA's motion. Pet. App. 11a.[4] Nearburg never demanded a jury, as required by Fed. R. Civ. P. 38(b), and there never was a suggestion in any pleading that Nearburg was entitled to a jury trial of any issue raised in the motion to enforce the settlement agreement.[5]

The trial court held several conferences dealing with discovery and scheduling procedures and on February 8, 1990 conducted a day long, full evidentiary hearing on the motion to enforce the settlement agreement.[6] Pet. App. 6a. These conferences and hearings accorded Nearburg complete due process. At the evidentiary hearing the parties were allowed to present evidence and witnesses and to cross-examine witnesses. Pet. App. 6a. Contrary to Nearburg's assertion, Pet. Brief at 4, the court allowed the parties to take necessary discovery in preparation for the evidentiary hearing, and Nearburg

[4] This late and inappropriate pleading was subsequently stricken by the district court. Pet. App. 11a.

[5] While petitioner repeatedly suggests that he was entitled to a jury trial, Pet. Brief at 2, 3, 4, he is unable to point to any proper demand for a jury trial. The most that petitioner can do is point to his statement to the district court that he objected "to anything short of a trial on [the] fact issue subject to the rules." Pet. App. 10a. This is not a jury demand, and Nearburg, in effect, got a bench trial as he requested. Pet. App. 6a, 14a.

[6] The district court did not even limit the hearing to one day. The court was prepared to allow Nearburg to present witnesses starting on the second day. Nearburg chose not to do so and instead relied only on depositions.

did, in fact, take four depositions. Those depositions included the two witnesses BA called at the hearing and two witnesses whose depositions were offered at the hearing by Nearburg. Although Nearburg's counsel actively cross-examined BA's witnesses, he chose not to present any live testimony, but instead relied on deposition testimony of Nearburg and of his wife, Gretchen Nearburg. At no time before or during any of these proceedings did Nearburg demand a jury trial.

On April 16, 1990, the district court issued an extensive Memorandum Opinion in which it reviewed the evidence and found that a settlement agreement had been reached. The court also found that Nearburg had repudiated the agreement in bad faith. At that time, the court entered a judgment against Nearburg in the amount that had been agreed upon in the settlement agreement, and it assessed attorneys' fees against Nearburg because of his bad faith conduct. Pet. App. 3a.

In reaching its decision to enforce the settlement agreement, the district court followed the well established guidelines of the Sixth Circuit. *See, e.g., Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1988); *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976); *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619 (6th Cir. 1973). While there was arguably sufficient evidence in the record to enforce the settlement agreement summarily, without an evidentiary hearing, *see, e.g., Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 177 (1990) (appellate court reversed trial court's denial of a motion to enforce a settlement where there were letters in the record that evidenced the existence of an agreement), the district court, nevertheless, gave Nearburg his day in court by scheduling a full evidentiary hearing. Nearburg's counsel did cross-examine witnesses and was able to present any evidence he chose. Indeed, Nearburg cannot point to any evidence he offered that was excluded.

Nearburg appealed the district court's judgment, raising myriad issues. Pet. App. 3a. He argued, *inter alia*, that he was denied his due process rights, and that the district court had failed to apply Texas law to the settlement. Nearburg cited to Texas Civil Rule 11, which requires settlement agreements to: (1) be read into the record, (2) be in writing, or (3) be the substantial equivalent of a writing. Pet. App. 5a. Nearburg, however, had never cited or raised the issues of Texas Civil Rule 11 prior to the entry of the judgment by the trial court, and the trial court did not specifically identify the substantive law that it was applying other than a recognition that it was complying with the Sixth Circuit guidelines to hold an evidentiary hearing.

The Sixth Circuit affirmed the district court. *Bameri-Lease Capital Corp. v. Nearburg*, 958 F.2d 150 (6th Cir. 1992). Pet. App. 1a-8a. In reviewing the district court's decision, the Sixth Circuit held that Nearburg had not been denied due process when the district court conducted a full evidentiary hearing. Pet. App. 6a-7a. The Sixth Circuit, however, did hold that the trial court committed error by not applying Texas law. The error was found to be harmless because an application of Texas law achieved the same result. Pet. App. 4a-6a. Therefore, the trial court's judgment was affirmed.[7]

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[7] In a concurring opinion, two of the judges suggested that federal common law could have been applied to achieve the same result, but they agreed that under Texas law there was an enforceable settlement agreement. Pet. App. 8a.

REASONS FOR DENYING THE WRIT

I. ALL CIRCUIT COURTS PROPERLY ALLOW THE ENFORCEMENT OF SETTLEMENT AGREEMENTS AFTER EVIDENTIARY HEARINGS.

Petitioner has shown no basis for granting certiorari in this case. The district court gave Nearburg a full opportunity to be heard in open court. He had the opportunity to present witnesses and to cross-examine witnesses. The trial court heard the evidence, allowed objections and ruled on objections, sustaining some and overruling others. Enforcing a settlement agreement after a full evidentiary hearing both satisfies the guidelines established in the Sixth Circuit in *Scheuner*, *Aro* and *Kukla* and is consistent with every other circuit.

While the petitioner suggests that the Sixth Circuit is unique in its approach to enforcing settlements, he fails to identify any conflict in the circuits. In fact, no conflict exists. More than 20 years ago, the D.C. Circuit held: "It is now well established that the trial court has power to summarily enforce on motion a settlement agreement entered into by the litigants while the litigation is pending before it." *Autera v. Robinson*, 419 F.2d 1197, 1200 (D.C. Cir. 1969). This right of district courts has been recognized by every federal circuit. The only question that arises is when the agreement can be summarily enforced without an evidentiary hearing. *See, e.g., Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969); *Dankese v. Defense Logistics Agency*, 693 F.2d 13 (1st Cir. 1982); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 177 (1990); *Kelly v. Greer*, 365 F.2d 669 (3d Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967); *Petty v. Timken Corp.*, 849 F.2d 130 (4th Cir. 1988); *Cia Anon Venezolana de Navegacion v. Harris*, 374 F.2d 33 (5th Cir. 1967); *Brock v. Scheuner Corp.*, 841 F.2d 151 (6th Cir. 1988); *Cummins Diesel Michigan, Inc. v. The Falcon*, 305 F.2d 721 (7th Cir. 1962); *Gatz v. Southwest Bank of Omaha*, 836 F.2d

1089 (8th Cir. 1988); *Callie v. Near*, 829 F.2d 888 (9th Cir. 1987); *Walker v. Department of Housing and Urban Dev.*, No. 90-C-122-B, slip op., 1992 U.S. App. Lexis 224 (10th Cir. Jan. 2, 1992); *Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981*, 836 F.2d 462 (10th Cir. 1987); *Ford v. Citizens and Southern Nat'l Bank*, 928 F.2d 1118 (11th Cir. 1991).

The policy supporting the enforcement of settlements was clearly expressed by the Sixth Circuit in *Aro*:

> Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers, as officers of the court, to make every reasonable effort to see that the agreed terms are fully and timely carried out. Public policy strongly favors settlement of disputes without litigation. . . . Settlement agreements should therefore be upheld whenever equitable and policy considerations so permit. By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter.

Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976). This policy, designed to conserve the scarce resources of federal trial courts, especially in these days of over-crowded dockets, is an eminently sound policy followed uniformly by the federal judiciary. The Sixth Circuit's steadfast implementation of this policy does not provide a basis for granting the petition.

II. NEARBURG WAS NOT DENIED HIS RIGHT TO DUE PROCESS.

The due process clause requires that the parties be given notice and an opportunity to be heard. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *United States v. Raddatz*, 447 U.S. 667 (1980); *Boddie v. Connecticut*, 401 U.S. 371, 377-379 (1971); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313

(1950). Nearburg had notice and a full evidentiary hearing. He is entitled to nothing more.

Nearburg suggests that the evidentiary hearing he received was not enough, but he provides no cogent explanation of why. It cannot be that Nearburg was denied a jury because he did not make a valid jury request.[8] It cannot be that Nearburg was denied discovery because he is unable to point to any part of the record that shows his discovery rights were denied before the evidentiary hearing. In fact, he took four depositions. It cannot be that Nearburg's evidence was excluded because he cannot point to any part of the record that shows exclusion of any evidence offered by him. Indeed, the district court characterized the hearing as a 104(a) hearing that would provide for "wide open examination and cross examination." Pet. App. 14a. This allowed the trial court to determine what evidence was admissible, and he reached an opinion based upon that admissible evidence.

Thus, Nearburg's "due process" argument reduces to his claim that the trial court should have reached a different conclusion based on the record of admissible evidence. Certiorari is not appropriate simply to determine whether the court below reached the correct result on the facts of this case.

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[8] Moreover, Nearburg has not asserted either here or below that he was denied his Seventh Amendment right to a jury trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
WILLIAM J. KEMPENICH
BA LEASING & CAPITAL CORPORATION/BANK OF AMERICA NT&SA
4 Embarcadero Center
12th Floor
San Francisco, CA 94111

MARILYN SHEA-STONUM
(Counsel of Record)
WILLIAM D. MANSON
JOHN A. WASLEFF
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Attorneys for Respondent